84-1629

No.

Office - Supreme Court, U.S.
FILED
APR 11 1985
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN; and EUGENE GLOVER, WILLIAM WINPISINGER and GEORGE POULIN as fiduciaries and trustees of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN,

Petitioners,

v.

EDWARD SHAW, Individually and On Behalf of All Other Persons Similarly Situated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD P. DONALDSON, ESQ.
(Counsel of Record)
DONALDSON & ASSOCIATES
2819 First Ave.
Seattle, WA 98121
(206) 682-5261

ALFRED M. KLEIN, ESQ.
ROSE, KLEIN & MARIAS
888 W. 6th St., 2nd Floor
Los Angeles, CA 90017
(213) 626-0571

LENA S. ZEZULIN, ESQ.
THOMAS J. HART, ESQ.
THOMAS HART & ASSOCIATES
1625 Massachusetts Ave., N.W.,
Suite 302
Washington, D.C. 20036
(202) 797-8700

April 11, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

43pp

QUESTION PRESENTED

Whether, in the administration of the Employee Retirement Income Security Act of 1974 (ERISA), a pension plan provision which provides for conditional increases in a retiree's normal retirement benefit, after retirement commences, is to be viewed as an "accrued benefit"?

INDEX

	Page
QUESTION PRESENTED	i
OPINION BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
1. The Ninth Circuit's Decision Involves an Erroneous Interpretation of an Important Provision of ERISA Which Will Have a Pervasive Detrimental Effect on Pension Plan Administration	6
A. The Decision Below Will Have a Devastating Financial Impact on the IAM Pension Plan	7
B. The Decision Below Will Also Have a Detrimental Effect on Pension Plan Administration Generally	8
2. The Ninth Circuit's Interpretation of "Accrued Benefit" is Clearly Erroneous	9
A. The Decision Below Misapplies the Definition of "Accrued Benefit" Under ERISA	10
B. The Decision Below Distorts ERISA's Legislative History	14
C. The Decision Below is Contrary to the Overall Statutory Scheme of ERISA	16
CONCLUSION	18
APPENDIX	
Opinion of Court of Appeals	1a
Excerpt from ERISA's Legislative History, H.R. Rep. No. 93-807, 93d Cong., 2d Sess. (1974), reprinted in II ERISA Legislative History at 3180-81	17a

CITATIONS

CASES

	Page
Alaska v. American Can Co., 358 U.S. 224 (1959)	7
Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981)	12, 13
Employee Benefits Committee of Hawaiian Telephone Co. v. Pascoe, 504 F.Supp. 958 (D. Haw. 1980), *rev'd on other grounds*, 679 F.2d 1314 (9th Cir. 1982)	13
Fine v. Semet, 699 F.2d 1091 (11th Cir. 1983)	13, 17
Nachman Corp. v. PBGC, 446 U S. 359 (1980), *reh. denied*, 448 U.S. 908 (1980)	17
Petrella v. NL Industries, 529 F.Supp. 1357 (D.N.J. 1982)	13, 17
Pompano v. Michael Schiavone & Sons, Inc., 680 F.2d 911 (2d Cir. 1982), *cert. denied*, 459 U.S. 1039 (1982)	14, 17
Shaw v. International Ass'n of Machinists and Aerospace Workers Pension Plan, 750 F.2d 1458 (9th Cir. 1984), *aff'g* 563 F.Supp. 653 (C.D. Cal. 1983)	*passim*
Sutton v. Weirton Steel Division, 567 F.Supp. 1184 (D.W.V. 1983), *aff'd*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 104 S.Ct. 2387 (1984)	13
United States v. Chicago, B. & Q. R. Co., 412 U.S. 401 (1973)	7
United States v. Zazove, 334 U.S. 602 (1948)	7
Zwissler v. Administrative Committee of the Kaiser Steel Retirement Plan, No. C-81-3282 EFL (N.D. Calif. 1983) (unreported)	13

STATUTES

28 U.S.C. § 1254(1)	2
29 U.S.C. § 1001, ERISA § 2	16
29 U.S.C. § 1002(23)(A), ERISA § 3(23)(A)	2, 10, 12
29 U.S.C. § 1053(a)(2), ERISA § 203(a)(2)	12
29 U.S.C. § 1054(b)(1)(A), (B) and (C), ERISA § 204(b)(1)(A), (B) and (C)	13
29 U.S.C. § 1054(c)(3), ERISA § 204(c)(3)	3, 10
29 U.S.C. § 1054(g), ERISA § 204(g)	*passim*

CITATIONS—Continued

	Page
29 U.S.C. § 1082(c)(8), ERISA § 302(c)(8)	*passim*
29 U.S.C. § 1083(a) and (b), ERISA § 303(a) and (b)	2
29 U.S.C. §§ 1301-1461, ERISA §§ 4001-4402	17
29 U.S.C. § 1322, ERISA § 4022	14, 17
29 U.S.C. § 1322A, ERISA § 4022A	17
29 U.S.C. § 1425, ERISA § 4244A	17
Pub. L. 96-364, Multiemployer Pension Plan Amendments Act (1980)	17
Pub. L. 98-397, Retirement Equity Act (signed into law on August 23, 1984)	9
REGULATIONS	
29 C.F.R. § 2613.1 *et seq.*	14
29 C.F.R. § 2621.1 *et seq.*	14
LEGISLATIVE HISTORY	
H.R. Rep. No. 93-807, 93d Cong., 2d Sess. (1974), reprinted in II ERISA Legislative History at 3180	14, 15
MISCELLANEOUS	
1982 Annual Report of the Pension Benefit Guarantee Corporation (PBGC 1983)	17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN; and EUGENE GLOVER, WILLIAM WINPISINGER and GEORGE POULIN as fiduciaries and trustees of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN,

Petitioners,

v.

EDWARD SHAW, Individually and On Behalf of All Other Persons Similarly Situated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, the International Association of Machinists and Aerospace Workers Pension Plan (hereinafter referred to as the "IAM Pension Plan" or the "Plan") and Eugene Glover, William Winpisinger and George Poulin as fiduciaries and trustees of the IAM Pension Plan (hereinafter referred to as the "Trustees"), respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 11, 1985.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 750 F.2d 1458 and also appears in the Appendix hereto. The opinion of the District Court for the Central District of California is reported at 563 F.Supp. 653.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was entered on January 11, 1985. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1)

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29, Employee Retirement Income Security Act ("ERISA") § 1054(g), ERISA § 204(g):

> The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 302(c)(8).

ERISA § 302(c)(8), 29 U.S.C. § 1082(c)(8), provides, in part, as follows:

> . . . No amendment described in this paragraph which reduces the accrued benefits of any participant shall take effect unless the plan administrator files a notice with the Secretary notifying him of such amendment and the Secretary has approved such amendment or, within 90 days after the date on which such notice was filed, failed to disapprove such amendment. No amendment described in this subsection shall be approved by the Secretary unless he determines that such amendment is necessary because of a substantial business hardship (as determined under section 303(b)) and that waiver under section 303(a) is unavailable or inadequate.

ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A), provides:

> The term "accrued benefits" means—(A) in the case of a defined benefit plan, the individual's accrued benefits determined under the plan and, except as provided in Section 204(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age.

STATEMENT OF THE CASE

Respondent Edward Shaw (hereinafter "Shaw") filed this action in order to prevent the IAM Pension Plan and its Trustees from applying a Plan amendment that was designed to save the Plan and its sponsor from financial disaster.

The IAM Pension Plan provides pension benefits to officers and employees of the International Association of Machinists and Aerospace Workers (hereinafter the "IAM") and its affiliated district and local lodges. The Plan (which today is a single plan resulting from the merger of three separate plans) had its genesis in various amendments to the IAM Constitution, starting in 1940. From the Plan's creation until 1976 it contained a provision, commonly referred to as the "living pension" feature, which provided for post-retirement benefit adjustments. The "living pension" feature provided for benefit increases, *after retirement*, in the same percentages as subsequent salary increases in the retirees' former positions.[1] This provision was, when adopted, felt to be reasonable and affordable. However, the unprecedented inflation rates of the 1960s and 1970s raised the cost of the post-retirement increases to such an extent that the solvency of the Plan and of the IAM itself were placed in serious jeopardy. The unfunded liability of the Plan (i.e., that liability not supported by present plan assets) had increased from $12,800,000 in 1967, to $40,800,000 in 1972, and to $77,100,000 in 1975 and was expected to grow larger in future years. It was estimated that the annual

---

[1] The text of the provision is set out on pages 11-12, *infra*.

cost to the IAM of amortizing this liability might be as much as 40% of its payroll and, in the opinion of the officers, the Union could not afford this level of payment and still achieve its organizational objectives. To remedy the situation, the IAM Pension Plan's actuaries recommended a number of Plan changes including a Plan amendment phasing out the "living pension" feature. In 1976, the delegates to an IAM Constitutional Convention voted to adopt the changes, including the phase-out amendment. The amendment, which became effective January 1, 1977, was applied to existing retirees, as well as future retirees. However, no existing retiree suffered any diminution of the benefits then being paid to him. Only future post-retirement benefit increases were phased out.[2] On two subsequent occasions the text of the Plan, including the language phasing out the "living pension" feature, was submitted to the Internal Revenue Service, with requests for favorable determination letters. On February 10, 1978, and again on March 12, 1978, the Internal Revenue Service issued favorable determination letters.

Shaw, a Plan participant who had retired in January, 1975, brought this action against the IAM Pension Plan and its Trustees in the United States District Court for the Central District of California, claiming that the Plan amendment violated ERISA. The District Court concluded that the Plan amendment, as applied to retirees who were on the rolls when the amendment became effective, violated ERISA § 204(g) because it decreased an "accrued benefit" and had not been approved by the Secretary of the Treasury pursuant to ERISA § 302(c)(8). 563 F. Supp. 653, 655-57. The District Court ordered a

---

[2] The phase out formula provided that the full percentage adjustment would be paid to retirees in 1977 and 1978 and, thereafter, the adjustments would be: 1979 and 1980—75% of usual adjustment; 1981 and 1982—50% of usual adjustment; 1983 and 1984—25% of usual adjustment; after December 31, 1984—no further adjustment.

restoration of the "living pension" feature, and a retroactive payment of benefit adjustments, for the existing retirees.

The IAM Pension Plan and its Trustees appealed the District Court's decision to the Ninth Circuit on the ground that ERISA § 204(g) was not violated by the Plan amendment because the "living pension" feature was not an "accrued benefit" within the meaning of that section. The Plan and its Trustees also urged the Ninth Circuit to hold that ERISA §§ 204(g) and 302(c)(8) were not in effect, as to this Plan, in 1976. Shaw cross-appealed on the issue of whether pre-judgment interest should have been awarded.[3]

In its opinion of January 11, 1985, the Ninth Circuit held that the ERISA provisions were applicable to the IAM Pension Plan in 1976. 750 F.2d 1458, 1463. It also held that the post-retirement "living pension" feature was an "accrued benefit" within the meaning of ERISA and could not be taken away except upon the approval of the Secretary of Treasury. In analyzing this issue, the Court stated that the "plain language of ERISA provides little help in determining whether the living pension feature is an accrued benefit or not." The Court observed, however, that the legislative history of ERISA describes "accrued benefits" as being distinguishable from "ancillary" or "non accrued" benefits, such as medical or life insurance, early retirement benefits, social security

[3] Shaw also cross-appealed the District Court's rejection of claims that the Plan amendment was a breach of the Trustees' fiduciary duty and a breach of contract. Shaw also appealed the Court's refusal to permit a post-judgment amendment of his complaint to add the IAM itself as an additional defendant. At the suggestion of the Ninth Circuit's Conference Attorney, the parties stipulated that the appeal to the Ninth Circuit would be initially limited to three issues: (1) whether the "living pension" feature was an "accrued benefit"; (2) whether ERISA § 204(g) applied to the IAM Pension Plan in 1976; and (3) the pre-judgment interest.

supplements, and joint and survivor annuities. The Court was of the view that the "living pension" feature did not fit within these "ancillary" categories and, therefore, should be considered an "accrued benefit." The Court also concluded that inasmuch as the "living pension" provision was incorporated in the text of the Plan, and operated to provide adjustments in the normal retirement benefit, it, therefore, became an "accrued benefit." 750 F.2d 1458, 1463-65. The District Court judgment was affirmed. 750 F.2d 1458, 1466.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit's Decision Involves an Erroneous Interpretation of an Important Provision of ERISA Which Will Have a Pervasive Detrimental Effect on Pension Plan Administration

The difference between "accrued benefits," and "ancillary" (or "non accrued") benefits, as developed in ERISA, is extremely important in the funding and administration of private pension plans. This is so because the term "accrued benefits" describes the amount of pension benefits received by a vested employee. The vesting and antiforfeiture provisions of ERISA only apply to such benefits as are accrued. All benefits that do not come within the concept of "accrued benefits" are viewed as "ancillary," and are not subject to the accrual and vesting rules of ERISA. The Ninth Circuit has distorted and expanded ERISA's definition of "accrued benefits." By concluding that a Plan provision for *post-retirement* benefit increases is an "accrued benefit," the Ninth Circuit unjustifiably expanded that concept and narrowed the concept of "ancillary benefits" (see Part 2 hereof).

The Ninth Circuit's broad interpretation of "accrued benefits" is clearly erroneous. Unless reversed, the opinion below will have a devastating financial impact on the IAM Pension Plan and its sponsor. It will also lay the groundwork for similar undermining of the funding and administration of other plans. Pension plans which have

heretofore provided what were considered to be ancillary benefits, capable of being adjusted or cancelled as financial circumstances warranted, may now be ordered to treat such benefits as inviolate. Pension plans which are considering the providing of such benefits will likely decide not to do so. Thus, the Ninth Circuit's decision will adversely affect a matter of significant public importance—the continued availability of ancillary benefits to millions of private pension plan participants. The potential impact of the decision on the private pension plan system warrants this Court's review.[4]

A. The Decision Below Will Have a Devastating Financial Impact on the IAM Pension Plan

As the Ninth Circuit acknowledged, the restoration of the "living pension" feature to Shaw and the other retirees will add approximately $25,000,000 of additional unfunded liabilities to the IAM Pension Plan and will require an additional annual contribution of $1,800,000. 750 F.2d 1458, 1465. These costs could be substantially increased if the rate of inflation and the concomitant increase in salaries should again advance as it did in the 1970s. The impact of this obligation cannot be overstated.[5] The ability of the IAM to continue to fund the IAM Pension Plan is now placed in question.[6]

---

[4] See e.g., *United States v. Zazove*, 334 U.S. 602, 613-614, n.17 (1948); *Alaska v. American Can Co.*, 358 U.S. 224, 225 (1959); and *United States v. Chicago, B. & Q. R. Co.*, 412 U.S. 401, 404 (1973).

[5] As of the time of the District Court proceeding, the most recent actuarial valuation of the Plan was one dated January 1, 1982. That valuation indicated that the amended Plan had total liabilities of $246,968,000, against which there were assets of $77,888,100, an estimate of the present value of future normal costs of $72,056,500, and unfunded liabilities of $97,023,400.

[6] The Court below suggested that the IAM could pursue the "statutory escape valve," provided in ERISA Sec. 302(c)(8), 29 U.S.C. § 1082(c)(8), which permits the Secretary of the Treasury

B. The Decision Below Will Also Have a Detrimental Effect on Pension Plan Administration Generally

The Ninth Circuit's broad interpretation of "accrued benefits" not only has a crippling impact on the IAM Pension Plan, but it is likely to have a similar negative effect upon pension plans generally.

In addition to the normal retirement benefits that are subject to ERISA's strict accrual and vesting rules, pension plans typically provide a variety of ancillary (or non accrued) benefits to their participants and beneficiaries. Such benefits have included:

- Medical insurance
- Life insurance
- Death benefits
- Severance benefits
- Pre-retirement counseling
- Supplemental benefits to encourage retirement
- Early retirement benefit options
- Supplemental benefits pending receipt of social security benefits
- Joint and survivor benefit options
- Lump sum cash out options
- Supplemental post-retirement benefits
- Subsidized residential or vacation housing

---

to approve plan amendments which reduce accrued benefits upon a showing of business hardship, as a potential solution to the Plan's funding difficulties. 750 F.2d 1458, 1465. The suggestion begs the basic question. A petition to the Secretary of Treasury is not available, or appropriate, unless a plan amendment operates to reduce "accrued benefits." The amendment at issue does not fall within that concept. (See Part 2).

The above list is not exhaustive. Plan sponsors have been exceedingly creative in identifying and providing new forms of ancillary benefits.[7] Such benefits are created or provided when the plan sponsor determines that they are feasible and affordable. They are generally financed on a pay as you go basis. Pension plans are not, however, prohibited from reducing or eliminating ancillary benefits when circumstances change (inflation, recession, industry shrinkage, change in technology, etc.).

The Ninth Circuit's decision, if not reversed, will create confusion in the ranks of pension plan sponsors, administrators and trustees as to the distinction between accrued and ancillary benefits. Some benefits, previously adopted and paid for as ancillary, may now be redefined by federal courts as accrued. Plans may now be required to continually fund benefits that they did not view, at the time of adoption, as being permanent. This may lead to financial difficulty for many plans.

The confusion resulting from the decision will also discourage plans from continuing to provide such benefits to new plan entrants or from adopting new ancillary benefit programs in the future. This will be to the detriment of plan participants and beneficiaries.

2. The Ninth Circuit's Interpretation of "Accrued Benefit" is Clearly Erroneous

The Ninth Circuit's interpretation of "accrued benefit" is at odds with the plain meaning of ERISA, the applicable legislative history, and the overall statutory scheme crafted by Congress. It is clearly erroneous.

---

[7] The flexibility afforded plan sponsors in this area has been narrowed in recent legislation. As part of the Retirement Equity Act (Pub. L. 98-397, signed into law on August 23, 1984), Congress amended ERISA § 204(g) to provide that certain retirement type subsidies, or options, will now be treated as "accrued benefits." The definitions are to be spelled out in regulations of the Secretary of Treasury.

A. The Decision Below Misapplies the Definition of "Accrued Benefit" Under ERISA

In determining that the "living pension" feature of the IAM Pension Plan was an ERISA "accrued benefit," the Ninth Circuit incorrectly stated that the statutory definition of the term was of "little help." In fact, the definition is clear and dispositive.

The definition in question is found in ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A):

> The term "accrued benefits" means—(A) in the case of a defined benefit plan, the individual's accrued benefits determined under the plan and, except as provided in Section 204(c)(3) of this title, *expressed in the form of an annual benefit commencing at normal retirement age.* (Emphasis added.)

A post-retirement benefit adjustment simply cannot be regarded as a "benefit commencing at normal retirement age."

The Court focused on the phrase "the individual's accrued benefit determined under the plan" and concluded that inasmuch as the terms of the IAM Pension Plan included references to the living pension adjustments, such adjustments were "accrued benefits." 750 F.2d 1458, 1464-1465. It was error for the Court to ignore the last phrase in the definition. Nowhere in the Ninth Circuit's opinion is the last phrase even acknowledged.

The "living pension" feature of the IAM Pension Plan was not an "accrued benefit" because, even though mentioned in the Plan, it was never expressed in the form of an annual benefit commencing at normal retirement age.

The Ninth Circuit sought to justify its treatment of the "living pension" feature as an "accrued benefit" by finding that the normal retirement benefits, and post-retirement increases, were all part of a unitary formula. This was not the case. When Shaw retired, the Pension

Plan described "the form of (his) annual benefit commencing at normal retirement age" as follows:

> Sec. 7. The pension payable monthly to a retiring eligible person pursuant to the provisions of this Art. (after December 31, 1968) shall be the following percentage of his current monthly salary immediately prior to his retirement date or his 65th birthday, whichever is sooner: (a) 2.5% for each completed year of recognized service, up to a maximum of 50%, for any pension commencing after attainment of age 60 or for any disability pension; and (b) for any pension (other than for disability) commencing after attainment of age 55 but before attainment of age 60, the above amount, reduced by 4/10ths of 1% for each full month by which the eligible person is younger than age 60 when his pension payments commence. In the event that a person's salary changes in the period immediately preceding his retirement, the administrators shall have the right to determine the bona fide salary which was paid prior to the retirement and it shall be relied upon in determining his pension.

The "living pension" feature of the Pension Plan *was not* part of Shaw's "annual benefit commencing at (his) normal retirement age." That feature was contained in a *separate distinct* paragraph in the Plan and, by its own words, was not to take effect until *after* retirement *had* commenced. The paragraph concerning the "living pension" feature read as follows:

> Pensions being paid to persons previously retired under this Art. shall be adjusted by applying the appropriate foregoing percentage to the salaries for positions corresponding to those in which they were employed immediately prior to their retirement, provided, however, that in no case shall such adjustment be made on a retroactive basis, nor increase any benefit to a survivor or beneficiary then being paid. Effective January 1, 1973, neither shall any such adjustment result in a pension payment which

is less than the amount paid to the retiree at the time of retirement.

Clearly, the terms of the Pension Plan do not encompass post-retirement adjustments within the description of the "annual benefit commencing at normal retirement ing).[9]

The emphasis in ERISA § 3(23)(A) on the "annual benefit commencing at normal retirement age" is fully consistent with the ERISA benefit accrual rules.

Benefit accrual is related to, but distinct from, the concept of vesting. Vesting refers to whether or not a participant in a pension plan is entitled to a pension benefit. A participant has a vested right to receive a benefit if he or she has completed sufficient years of credited service under one of three rules set forth in ERISA § 203(a)(2), 29 U.S.C. § 1053(a)(2). Thus, vesting refers to whether or not a pension is payable. Accrual of benefits, on the other hand, refers to the size, or amount, of a vested pension. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510, n. 6, 512, n. 9, 513 (1981).

ERISA establishes rules which require that a participant be entitled, after each year of credited service, to a specific portion of a total benefit to which he or she would ultimately be entitled at *normal retirement age* (assuming continuous plan participation and full vesting).[9]

---

[8] The language of the Pension Plan booklet is even more distinctive than the Constitution provisions. The normal retirement benefit (i.e., the annual benefit commencing at normal retirement age) is explained in the first paragraph on page 5. The living pension feature is separately described, four paragraphs later, on page 6. (Pension Plan booklet, pp. 5-6).

[9] ERISA provides three methods for determining a participant's accrued benefit in a defined benefit plan. The first rule provides that for each year of participation, up to 33⅓ years, an employee must accrue at least 3% of *the normal retirement benefits* to which

This view of the accrual rules was adopted by this Court in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981):

> ERISA prescribes vesting and accrual schedules, assuring that employees obtain rights to at least portions of their *normal pension benefits* even if they leave their position prior to *retirement* (emphasis added).

Following this Court's guidance, federal courts considering the meaning of "accrued benefits" under ERISA have similarly adopted a narrow interpretation. See e.g. *Zwissler v. Administrative Committee of the Kaiser Steel Retirement Plan*, No. C-81-3282 EFL (N.D. Calif. 1983) (unreported) (lump sum cash out option held not to be an accrued benefit); *Employee Benefits Committee of Hawaiian Telephone Co. v. Pascoe*, 504 F. Supp. 958 (D. Haw. 1980) (disability retirement benefits payable prior to normal retirement age held not to be part of an accrued benefit), *rev'd on other grounds*, 679 F.2d 1319 (9th Cir. 1982); *Petrella v. NL Industries*, 529 F. Supp. 1357 (D. N.J. 1982) (early retirement benefits, early retirement options, life insurance and major medical benefits held not to be accrued benefits); *Sutton v. Weirton Steel Division*, 567 F. Supp. 1184 (D. W.V. 1983) (conditional early retirement benefits held not to be accured benefits), *aff'd*, 724 F.2d 406 (4th Cir. 1983). See also *Fine v. Semet*, 699 F.2d 1091 (11th Cir. 1983);

---

he would be entitled if he began participation at the earliest possible age of entry and served until age 65 (or the plan's normal retirement age, if earlier). The second rule permits *the normal retirement benefits* to be accrued at an accelerated rate but not in excess of 133⅓% of the accrual rate for the prior year. The third rule permits a plan to provide that the minimum accrued benefit payable on separation from service is a ratable portion of the benefits a participant would get *at normal retirement* if he continued to earn his present salary until that date. ERISA § 204(b)(1)(A), (B) and (C), 29 U.S.C. § 1054(b)(1)(A), (B) and (C).

Pompano v. Michael Schiavone & Sons, Inc., 680 F.2d 911 (2d Cir. 1982) (lump sum arrangement held to be outside ERISA requirements), *cert. denied*, 459 U.S. 1039 (1982).

The "living pension" feature clearly could not, ever, be accumulated as a percentage of a benefit that is payable at normal retirement age. By its very terms, it is quantifiable only after retirement. No participant could have an ERISA accrued right to a "living pension" because the "living pension" was not part of the calculated normal retirement benefit to which the participant became entitled as he or she accumulated years of service with the Plan.[10] In holding otherwise, the decision below substantially rewrites ERISA's concept of benefit accrual.

B. The Decision Below Distorts ERISA's Legislative History

The only pertinent legislative history, House Committee Report 93-807, plainly states that the "term 'accrued benefit' refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits." [11] As examples of ancillary benefits the Committee Report lists medical insurance, life insurance, benefits that begin before retirement age, social security supplements

---

[10] It is significant to note, also, that post-retirement benefit adjustments are not such accrued benefits as would be guaranteed by the Pension Benefit Guaranty Corporation in the event of a plan termination. Under ERISA and the PBGC regulations, only "basic benefits" which are being paid at the time of plan termination, will be guaranteed. ERISA § 4022, 29 U.S.C. § 1322; 29 C.F.R. § 2613.1 *et seq.* See also 29 C.F.R. § 2621.1 *et seq.*, which deals with limitations on guaranteed benefits. Section 2621.5 provides that benefit increases which have not been in effect for five years are not guaranteed, and § 2621.2 includes, as an example, "cost of living" increases which are provided for in a pension plan.

[11] H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 60 (1974), reprinted in II ERISA Legislative History at 3180 and also excerpted in the Appendix hereto at page 17a.

paid until a participant begins to receive social security, and the value of joint and survivor annuity benefits that exceed single life annuities. The Committee Report concludes by describing "accrued benefit" in terms of the individual's *normal retirement benefit:*

> Generally, an individual's "accrued benefit" under a defined benefit plan is to be expressed in the form of an annual benefit commencing at normal retirement age. Normal retirement age is the age specified in the plan, which may not be later than age 65 (or, if later, the 10th anniversary of the time the participant commenced participation in the plan). *Id.*

The Court below viewed the Committee's examples of ancillary benefits as creating exclusionary categories and improperly presumed that benefits not specifically excluded must be regarded as accrued. The Court reasoned that the "living pension" feature must be accrued, because it "does not fit within any of the enumerated categories of ancillary or non accrued benefits." This is an illogical view. Nothing in the Committee Report suggests an intent to define "accrued benefit" in terms of what does not qualify as an "ancillary benefit." The suggestion is the opposite. Benefits which do not meet the "accrued benefit" test are to be considered "ancillary."

The Ninth Circuit's illogical view of legislative history is also internally inconsistent. In its opinion, the Court summarized the enumerated ancillary benefits as being those which '(1) "lack the 'primary function . . . (of) providing retirement income" and (2) "are generally provided by succeeding employers." The inconsistency is particularly apparent when one reviews the Court's asserted criteria for ancillary benefits in light of two examples of such benefits set forth in the Committee Report. The Ninth Circuit concedes that social security supplements and joint and survivor annuities are, according to the legislative history, "ancillary" benefits. However,

these benefits plainly do not meet the criteria for ancillary benefits that the Court purported to reason from the legislative history. The social security option is not transferable and it does, of course, supplement retirement income. The same is true for the joint and survivor option.

In fact, the "living pension" feature is very much similar to the social security supplement. Both are conditional in that the amount of the benefit provided through each depends upon economic factors (and post-retirement events) over which neither the Plan nor participants have any meaningful control. For example, inflation greatly increased the cost of the "living pension." Similarly, Congressional action to reduce, increase or freeze social security benefits or to delay the normal retirement age for social security recipients could astronomically increase or decrease the cost of a social security supplement. It is arbitrary and irrational to conclude that the "living pension" feature is an accrued benefit, but a social security supplement is not.

C. The Decision Below is Contrary to the Overall Statutory Scheme of ERISA

ERISA is a complex statute which, while protecting participants' interests, also speaks to the importance of maintaining "the equitable character of . . . plans and their financial soundness." (ERISA § 2, 29 U.S.C. § 1001). Thus, ERISA improved the benefit security of Americans in two ways: it promoted the financial integrity of employee benefit plans and it established rules for protecting the receipt of benefits by individuals. The two approaches were clearly interrelated, since the financial stability of plans ultimately protects the benefits of plan participants.

These two approaches also required considerable balancing, since extensive protection of every plan benefit, including ancillary benefits, could undermine the funding

security of many plans. As this Court has observed, ERISA is a "comprehensive and reticulated statute" in which Congress established many detailed rules to improve the overall pension security of Americans. *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980), *reh. denied*, 448 U.S. 908 (1980). It is important in the statutory scheme, that plans be permitted to make reasonable changes and adjustments in order to insure their financial strength for the benefit of all participants.[12] The participants' expectation of receiving plan benefits is largely illusory if the plan cannot be properly funded.[13] It is not appropriate for Courts to extend or to reduce the scope of ERISA or of individual ERISA provisions.

---

[12] Following *Nachman*, both the Second and Eleventh Circuit Courts of Appeals have spoken of the importance of avoiding ERISA interpretations which undercut the "flexibility essential to effective and responsible financial management of the (pension) plan." *Pompano v. Michael Schiavone & Sons, Inc.*, 680 F.2d 911, 914 (2d Cir. 1982), *cert. denied*, 459 U.S. 1039 (1982); *Fine v. Semet*, 699 F.2d 1091, 1094 (11th Cir. 1983). See also *Petrella v. NL Industries, Inc.*, 529 F.Supp. 1357, 1365 (D. N.J. 1982).

[13] Under Title IV of ERISA, §§ 4001-4402, 29 U.S.C. §§ 1301-1461, certain single employer pension plan benefits are guaranteed by the Pension Benefit Guaranty Corporation in the event of a plan failure. However, guaranteed benefits are subject to statutory maximums, which may be less than the benefits promised by the plan. ERISA § 4022, 29 U.S.C. § 1322. The same is also true with respect to benefits payable from a multiemployer plan. Under the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 93-364 (1980), Title IV was amended to provide guaranteed benefits, subject to certain maximums. ERISA § 4022A, 29 U.S.C. § 1322A. Also, it is the responsibility of the trustees of a multiemployer plan in financial difficulty to reduce accrued benefits to the statutory levels. ERISA § 4244A, 29 U.S.C. § 1425. The 1982 Annual Report of the Pension Benefit Guaranty Corporation (PBGC 1983) recites that the agency has taken over some 780 single employer plans which have become insolvent, covering some 106,000 participants (at p. 2). Clearly, it is in the participants' best interest if their private pension plans remain healthy so that benefits can be drawn from the plans rather than through the government guarantee programs.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Unless the Ninth Circuit's decision is reviewed and reversed, the concept of benefit accrual under ERISA will be fundamentally distorted to the significant detriment of pension plan participants and beneficiaries, and the security and stability of pension plan funding and administration will be seriously impaired. The Ninth Circuit's decision has especially damaged the IAM Pension Plan because the decision requires the payment of millions of dollars. Furthermore, the potential impact of the decision below is to discourage pension plans nationwide from continuing to provide ancillary benefits.

Respectfully submitted,

RICHARD P. DONALDSON, ESQ.
(Counsel of Record)
DONALDSON & ASSOCIATES
2819 First Ave.
Seattle, WA 98121

ALFRED M. KLEIN, ESQ.
ROSE, KLEIN & MARIAS
888 W. 6th St., 2nd Floor
Los Angeles, CA 90017

LENA S. ZEZULIN, ESQ.
THOMAS J. HART, ESQ.
THOMAS HART & ASSOCIATES
1625 Massachusetts Ave., N.W.,
Suite 302
Washington, D.C. 20036

April 11, 1985

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 83-6443, 83-6458

EDWARD SHAW, individually and on behalf of all other persons similarly situated,
Plaintiff/Appellee, Cross-Appellant,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN; and EUGENE GLOVER, WILLIAM WINPINSINGER and GEORGE POULIN as fiduciaries and trustees of the INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS PENSION PLAN,
Defendants/Appellants, Cross-Appellee.

Argued and Submitted Dec. 6, 1984
Decided Jan. 11, 1985

Appeal from the United States District Court
for the Central District of California

Before SNEED, ANDERSON and FERGUSON, Circuit Judges.

FERGUSON, Circuit Judge:

The International Association of Machinists and Aerospace Workers Pension Plan ("IAM") appeals from the district court's denial of its motion for summary judgment and its granting of plaintiff Shaw's motion for summary judgment. The IAM in this case is in the posture of employer; its pension plan benefited retired IAM officers, organizers and support staff. The IAM plan contained a "living pension" feature that tied the amount of payments to pensioners to the current salary of the job from which the pensioner retired. Thus, as salaries for positions rose, pensions to retirees who formerly held those positions also rose.

Due to the increasing financial strain that this "living pension" feature placed on the fiscal soundness of the plan, the IAM adopted an amendment to the plan that phased out the living pension feature over several years. ERISA, however, provides: "The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than amendment described in section 1082(c)(8) of this title." 29 U.S.C. § 1054(g). The amendment in this case was not one "described in section 1082(c)(8)."

If the limitation on amendments contained in § 1054(g) was effective against the IAM, a labor union, on the date the amendment was adopted, it might render that amendment illegal. One question, therefore, is whether the amendment reduces an "accrued benefit," or simply an ancillary benefit. The other question is whether the limitation on amendments quoted above was effective against the IAM on the date that the IAM plan adopted that amendment.

Shaw also contends that the district court erred in declining to award prejudgment interest. That decision, however, lies within the district court's discretion and its careful balancing of the equities. The court correctly

weighed the financial strain that prejudgment interest would place on the IAM along with other factors, and correctly declined to enhance Shaw's award.

FACTS

The current IAM Pension Plan is an "employee benefit pension plan" as that term is defined in ERISA § 3(2), 29 U.S.C. § 1002(2). It was created in 1980 as the result of a merger of three previously maintained staff pension plans.

The terms of the merged plan are contained in the IAM Constitution and the IAM Pension Plan booklet. The unamended plan calculated monthly pension benefits by multiplying three numbers: 2.5%, times years of credited service, times final monthly salary. In Mr. Shaw's case the completed equation would be: (2.5%) × (10 years) × ($1,732.47 final salary) = $433.12. (Mr. Shaw chose a joint and survivor option, which lowered his monthly benefit to $209.19 but would continue benefits to his spouse upon his death; the calculation of his initial monthly benefit, upon which the joint and survivor option is based, remains the same, however.)

The unamended plan also contained a "living pension" feature that geared increases in the retiree's pension benefits to salary increases in the position the retiree held immediately prior to retirement. The plan accomplished this by substituting the current monthly salary for the retiree's final monthly salary in the above equation. The IAM constitution's own words describe it this way: "Pensions being paid to persons previously retired under this Art. *shall* be adjusted by applying the appropriate foregoing percentage to the salaries for positions corresponding to those in which they were employed immediately prior to their retirement." IAM Constitution, Art. XV, Sec. 7, Computation of Pension, ¶ 2 (emphasis supplied). Thus, the constitution retains the same multiplier —2.5% times years of service—but changes the multipli-

cand and, by using the word "shall," makes this change mandatory.

The IAM's Pension Plan booklet explains this change in similarly mandatory and clear language: "If, after your retirement, the salary for the position you held immediately prior to your retirement is changed, the amount of your pension will be adjusted accordingly." P. 10. The booklet contains sample computations on page 26 in which the multiplicand is simply called "Monthly Pay," but *whose* monthly pay is not specified.

Shaw turned sixty-five in January, 1975. He retired from his job as business representative for District Lodge 710 of Torrance, California. The district court's opinion summarized succinctly the effect of the amendment upon the benefits to which Shaw was previously entitled:

> In September, 1976, the delegates to a quadrennial IAM convention voted to amend the pension plan provisions of the constitution so as to phase out the living pension feature. This phase-out provided that the full percentage adjustment would be paid to retirees in 1977 and 1978, but thereafter, the living pension adjustments would be as follows:
>
> 1979 and 1980—75% of full adjustment
>
> 1981 and 1982—50% of full adjustment
>
> 1983 and 1984—25% of full adjustment.

Shaw v. International Association of Machinists and Aerospace Workers Pension Plan, 563 F.Supp. 653, 654 (C.D. Cal. 1983).

This amendment decreases Shaw's benefits. However, the only amendments subject to ERISA's limitation on amendments—§ 1054(g)—are amendments that decrease "accrued benefits" and that were adopted after the effective date of the limitation. The IAM challenges the district court's decision that (1) the amendments occurred

within ERISA's effective date; and (2) Shaw's pension benefits, including its living pension feature, were accrued, and thus could not be summarily decreased.

STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*. *Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir.1984). In this case, there are no relevant contested issues of fact with respect to summary judgment; thus, "the panel need only decide whether the substantive law was correctly applied." *Id.* Shaw's cross-appeal of the district court's denial of prejudgment interest is reviewed under the abuse of discretion standard. *See Bricklayers' Pension Trust Fund v. Taiariol*, 671 F.2d 988, 990 (6th Cir. 1982).

DISCUSSION

1. *The Act's Effective Date*

Part 2 of ERISA contains participation and vesting requirements. In this part, 29 U.S.C. § 1054(g) provides: "The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in [29 U.S.C. § 1082(c)(8), contained in Part 3 of ERISA]." Part 2's mandates became effective "in the case of plan years beginning after September 2, 1974." 29 U.S.C. § 1061(a). Therefore, the effective year would be 1975.

Part 3 of ERISA provides funding requirements. This part contains 29 U.S.C. § 1082(c)(8) to which the Part 2's limitation on amendments refers. This section provides a description of the only permissible means of decreasing plan benefits by amendment. Such an amendment will be approved if: "the plan administrator files a notice with the Secretary notifying him of such amendment and the Secretary has approved . . . or . . . failed to disapprove such amendment." Part 3's effective dates

vary. It becomes effective against pension plans for employees of tax-exempt labor organizations (under 26 U.S.C. § 501(c)(5)), such as the IAM, on the earlier of:

> (1) the date on which the second convention of such labor organization held after September 2, 1974, ends or
>
> (2) December 31, 1980.

29 U.S.C. § 1086(e). In this case, that date would be September 10, 1980, the date on which the IAM's second convention after September 2, 1974, ended.

The controverted amendment was adopted at IAM's 1976 convention—in between 1975 and 1980. If Part 3's effective date governs, the amendment could reduce accrued benefits with impunity; if Part 2's effective date governs, no amendment could reduce accrued benefits unless application was made to, and approved by (or not disapproved by), the Secretary.

The IAM argues that the later date governs. It reasons that Part 2's (§ 1054(g)'s) limitation on amendments, because it refers to a permissible amendment process described in Part 3 (§ 1082(c)(8)), must incorporate the latter's deferred effective date. This interpretation is illogical: it makes the first section, the broad prohibition on decreases, superfluous, and makes the second section, the exemption, become the rule. This interpretation also contradicts ERISA's purposes. Part 2's section, 1054(g), protects vesting by prohibiting decreases in accrued benefits in most circumstances. This general declaration comports with ERISA's general concern for protecting workers' vested interests. Part 3's section, 1082(c)(8), describes the procedure for procuring an exception to the general prohibition. It would flout the purpose of ERISA for us to expand the applicability of the exception by making it effective earlier than Congress did. It would also create an unprecedented six-

year window—between 1974 and 1980—within which union plans could unilaterally decrease accrued benefits with impunity. General contract principles precluded such action before ERISA. *See UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 575 n. 14, 102 S.Ct. 1226, 1234 n. 14, 71 L.Ed.2d 419 (1982). As Shaw correctly points out, "It would be ironic indeed if ERISA were interpreted to casually dispense with even this modicum of protection."

The IAM plan also argues that Congress intended that ERISA be interpreted the plan's way. They contend, explicitly, that to achieve consistency between ERISA's Title I (Labor Code) and Title II (Tax Code) amendments, both titles' dates of effectiveness with respect to labor unions should be deferred equally. They also contend, implicitly, that to achieve consistency between ERISA's Labor Code provisions—Part 2, Participation and Vesting, and Part 3, Funding—both Parts' dates of effect with respect to labor unions should be identically extended.

Congress, however, seems to have been conscious of the fact that it adopted staggered and discrepant dates of effectiveness. In fact, a report called all these differences to the attention of House and Senate conferees. Staff of House and Senate Conferees on H.R. 2, 93d Cong., 2d Sess., *Summary of Differences Between the Senate Version and the House Version of H.R. 2 to Provide for Pension Reform, Prepared for the Use of the House and Senate Conferees on H.R. 2, Part One, Participation, Vesting, Funding, Actuaries, Jurisdiction and Portability* at 28 (Comm. Print, May 15, 1974) [hereinafter "Conferees' Report"], *reprinted in* III Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, Legislative History of the Employee Retirement Income Security Act of 1974, 5151 at 5181 [hereinafter "Legislative History"]. This Conferees' Report compared House and Senate versions of

Title I's and Title II's effective dates for Part 2's vesting requirements, and referred specifically to the question of delayed applicability to labor unions, by referring to "Staff Comments" on pp. 10-11. *Id.* The Conferees' Report also compared House and Senate versions of Title I's and Title II's effective dates for Part 3's funding requirements, and noted specifically the potential discrepancy between effective dates for funding and vesting. Conferees' Report at 41, III Legislative History at 5181 and 5194-95. Indeed, the staff commented with respect to funding: "Some of the staff believe the effective dates for funding should be the same as for vesting, and others believe (if an early effective date is chosen for vesting) that the effective dates for funding should be later than for vesting." Conferees' Report at 42, III Legislative History at 5195 (parenthesis in original). And, referring to vesting and participation, the staff commented: "The conferees may wish in the case of plans maintained by tax-exempt labor organizations to apply new standards [at a later date]." Conferees' Report at 11, III Legislative History at 5164. Congress responded by adopting only a limited deferment of applicability to labor unions —for the Labor Code's funding requirements, but not its vesting requirements. Its seemingly discordant effective dates thus seem to reflect conscious choices.

Shaw argues that § 1054(g)'s limitation on amendments is almost absolute, excepting only the cross-referenced procedure of applying to, and securing the approval of, the Secretary. Absent compliance with the cross-referenced procedure, Shaw argues, no amendments may decrease benefits. Despite the delayed applicability of this procedure to labor unions, the earlier applicability of the general, substantive prohibition governs. To rule otherwise would effectively repeal § 1054(g)'s general, substantive mandate against decreasing accrued benefits, and leave available only § 1082(c)(8)'s allowance of decreasing accrued benefits through later amendments.

The legislative history is illuminating on this point. The bills that were to become ERISA originally contained no distinction between the dates of effectiveness for vesting and funding provisions or with respect to labor unions and other plans. *E.g.*, S. 4, 93d Cong., 1st Sess. § 701 (1973), *reprinted in* I Legislative History at 189. Deferred applicability of participation and funding provisions to labor organizations began to appear later. *See* H.R.Rep. No. 93-779, 93d Cong., 2d Sess. 51, 100 (1974), *reprinted in* II Legislative History at 2640, 2689. The legislature was aware that discrepancies appeared in the effective dates for different Parts, but it tolerated later effective dates "in the case of plans in existence on January 1, 1974, in order to afford such plans adequate opportunity to adopt any amendments needed in order to conform to the new requirements resulting from this bill." Committee on Education and Labor, Employee Benefit Security Act of 1974: Material Explaining H.R. 12906 Together with Supplemental Views, *reprinted in* II Legislative History 3293 at 3334. The legislature even contemplated a means for resolving some seeming discrepancies:

> Where a qualified plan does not meet the funding requirements of existing law because of vesting or participation requirements made applicable by the substitute and where the funding requirements of the conference substitute do not become applicable until a later time than the vesting or participation requirements, then to the extent that failure to meet the funding requirements of existing law is attributable to these new vesting or participation requirements, no plan is to be disqualified in this interim period on the grounds of underfunding.

H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 294 (1974), U.S. Code Cong. & Admin. News 1974, pp. 4639, 5074, *reprinted in* III Legislative History 4277 at 4561. We have the opposite problem here: not underfunding, but

"undervesting"—failure to meet the vesting section's mandates. But the IAM's failure is not attributable to the potentially exculpatory effect of its striving to meet funding requirements. No funding requirement demanded contravention of the vesting requirement regarding diminution of accrued benefits. In the absence of such a conflicting, and thus potentially exculpatory, mandate, the vesting section's provisions are effective and absolute.

Congress chose to defer applicability of ERISA's funding provisions to labor unions, but not to deter ERISA's vesting provisions. ERISA's limitation on decreasing accrued benefits by amendment was thus effective in 1975, one year before the IAM adopted its take-away amendment.

II. *The living pension feature is an "accrued benefit" within the meaning of ERISA and thus subject to ERISA's limitation on amendments decreasing accrued benefits.*

ERISA provides: "The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 302(c)(8) [29 U.S.C. § 1082(c)(8)]." 29 U.S.C. § 1054(g). Shaw and the IAM disagree over whether the living pension feature is an accrued benefit within the meaning of this section. If the feature were an accrued benefit, it would be subject to the limitations on decrease of benefits through plan amendment for which this section, and the cross-referenced section, provide; if the feature were not an accrued benefit, then it is subject to no such limitation.

The plain language of ERISA provides little help in determining whether the living pension feature is an accrued benefit or not:

> The term "accrued benefit" means . . . in the case of a defined benefit plan, the individuals's accrued

> benefit determined under the plan and, except as provided in section 1054(c)(3), expressed in the form of an annual benefit commencing at normal retirement age . . . .

29 U.S.C. § 1002(23). Thus, ERISA's language provides only two sources for defining "accrued": (1) a tautological reference to the individual's accrued benefit; and (2) a somewhat more enlightening reference to the plan. Before turning to the plan itself, we turn to other sources of guidance.

ERISA's history provides a little more help. It, too, defers to the private employer's plan, "subject to certain requirements." H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 60 (1974), *reprinted in* II Legislative History at 3180. It describes benefits that are considered accrued. This category includes pension or retirement benefits, and the types of benefits that are not generally transferable when employees move on to new jobs. It distinguishes these from ancillary benefits, such as medical or life insurance. Benefits in this latter category lack the "primary function . . . [of] provid[ing] retirement income"; are generally provided by succeeding employers. Also, accrued benefits do not include

> such items as the value of the right to receive benefits commencing at an age before normal retirement age, or so-called social security supplements which are commonly paid in the case of early retirement but then cease when the retiree attains the age at which he becomes entitled to receive current social security benefits, or any value in a plan's joint and survivor annuity provisions to the extent that exceeds the value of what the participant would be entitled to receive under a single life annuity.

Id., U.S. Code Cong. & Admin. News 1974, p. 4726.

The living pension feature fits more easily within the enumeration of accrued benefits. The feature is a "pen-

sion or retirement benefit[]"; it primarily provides retirement income; and it is not generally transferable from one employer to another. The living pension feature does not fit within any of the enumerated categories of ancillary or nonaccrued benefits. Aside from these categories, "the accrued benefit is to be determined under the plan." H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 273 (1974), U.S. Code Cong. & Admin. News 1974, p. 5054, *reprinted in* III Legislative History 4277 at 4540.

The case law also categorizes various benefits as either vested or ancillary. No case, however, deals with the narrow issue of post-retirement upward adjustments like the living pension provision. The categories defined by the case law parallel those enumerated in the legislative history. In *Sutton v. Weirton Steel Division of National Steel Corp.*, 567 F.Supp. 1184 (W. Va. 1983), *aff'd* 724 F.2d 406 (4th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984), for example, the district court held:

> An examination of the eligibility requirements for 70/80 and rule of 65 retirement reveals they are conditional and in the nature of early retirement benefits and cannot be considered nonforfeitable or as an accrued benefit. . . . Since the increased $400.00 per monthly pension is conditioned upon eligibility for 70/80 or rule of 65 retirement, it cannot be considered nonforfeitable.

Id. at 1196. The living pension feature, in contrast, is not "in the nature of early retirement benefits." Nor is it "conditional": the Constitution provides for the adjustment in mandatory language, to be measured by an occurrence wholly outside the pensioner's control. The *Sutton* court used the legislative history as a guide, but it made its determination based on the terms of the plan itself.

On appeal, the court added the term "unfunded" to describe the typical unaccrued, contingent early retire-

ment benefit. 724 F.2d at 409. This bolstered further the district court's decision that the unfunded early retirement benefits at issue in that case were ancillary, rather than funded. The living pension feature in the IAM Plan, in contrast, was included with the rest of the pension funds when the Plan's liabilities were computed.

Similarly, in *Petrella v. NL Industries, Inc.*, 529 F. Supp. 1357 (D. N.J. 1982), the court recited the difference between ancillary and accrued benefits under ERISA and decided that the benefits before it were not accrued. *Id.* at 1366. This case squeezed into the ancillary category five plans: two early retirement plans; a plan providing supplemental benefits to retirees until the age of 65; a level income option that pays higher monthly benefits to start, and then decreases payments after the retiree is eligible for social security to make up the difference; and life insurance and major medical benefits. This case provided no new indices of difference between accrued and ancillary. The benefits in *Petrella* paralleled those listed in ERISA as ancillary: early retirement, life insurance and medical plans. The living pension feature, in contrast, parallels none of ERISA's list of ancillary or nonaccrued benefits. And, again, the *Petrella* court looked to the terms of the plan to determine into which camp its benefits fell.

The terms of the IAM Plan support our conclusion that Shaw's living pension benefits were accrued. The plan takes explicit form in the IAM Constitution and the IAM Pension Plan booklet. In the Constitution, the monthly pension benefit is described in terms of a formula. The formula contains three numbers: years of service, the 2.5% rate, and the salary by which the product of these two numbers is to be multiplied. In paragraph one of Section 7, the salary is described as the participant's "current monthly salary immediately prior to his retirement date." In paragraph two of that section, the salary is described as "the salaries for positions corresponding

to those in which they were employed immediately prior to their retirement . . . ." Thus, the living pension "adjust[s]" the basic formula for determining benefits at normal retirement, rather than providing a separate, unfunded, optional plan like medical coverage or early retirement. It describes the multiplicand; it does not provide a separate formula or benefit. When the pension plan booklet shows exemplary pension benefit computations, it shows the "salary" figure as a multiplicand; it shows no separate formula or benefit to be added. *Cf. In re W.S. Dickey Clay Manufacturing*, 720 F.2d 25, 27 (10th Cir. 1983) (even where the terms of the pension plan explicitly retain the power to change the multiplier in the benefit determination formula, the benefits are not forfeitable). The living pension feature was therefore an accrued benefit, just like the rest of Shaw's pension benefits.

The IAM declined to take advantage of the statutory escape valve that allows the Secretary to approve amendments decreasing accrued benefits upon a showing of substantial business hardship. 29 U.S.C. § 1082(c)(8). Perhaps the IAM can now submit its discussion of financial hardship, which is irrelevant to our decision, to the Secretary. We see no time limit on applications brought under that escape valve section.

III. *The district court did not err in declining to award prejudgment interest.*

On cross-appeal, Shaw challenges the district court's decision to deny him prejudgment interest. He asserts that in this case, an award of prejudgment interest is necessary to achieve full compensation.

"Whether interest will be awarded is a question of fairness, lying within the court's sound discretion, to be answered by balancing the equities." *Wessel v. Buhler*, 437 F.2d 279, 284 (9th Cir. 1971). *See also Maxwell v. Lucky Construction Co.*, 545 F.Supp. 213, 215-16 (C.D.

Cal. 1982). The district court in this case explicitly balanced the equities:

> [T]he adoption of the pension plan amendment . . . was not attended to by any consideration of bad faith or ill will. Additionally, the issue on which the court invalidated the amendment (i.e., failure to comply with Section 204(c) of ERISA) is a genuine and complicated issue. Lastly, the restoration of the original "living pension" feature to plaintiff and other retirees similarly situated who retired on or before January 1, 1977, will add approximately $25,000,000 of additional unfunded liabilities to the IAM Pension Plan, and will require an additional annual Union contribution of some $1,800,000. Under the circumstances, the Pension Plan should not be further burdened with the addition of prejudgment interest....

The additional financial strain that an award of prejudgment interest would place on the IAM could injure other beneficiaries of its pension plan. It could also injure the IAM's own members. *Cf. International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50-51, 99 S.Ct. 2121, 2126-2127, 60 L.Ed.2d 698 (1979) (employee not entitled to punitive damages from the union against whom he brought his breach of duty of fair representation claim, because "[s]uch awards could deplete union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents."). For all these reasons, the district court's decision declining to award prejudgment interest to Shaw was not in error.

CONCLUSION

Congress determined "that despite the enormous growth in . . . [pension] plans many employees with long years of employment are losing *anticipated retirement benefits* owing to the lack of vesting provisions in such plans." 29 U.S.C. § 1001(a) (emphasis supplied). The Supreme

Court has held, "Congress through ERISA wanted to ensure that 'if a worker has been *promised a defined pension benefit* upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—. . . he actually receives it.'" *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510, 101 S.Ct. 1895, 1899, 68 L.Ed.2d 402 (1981) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375, 100 S.Ct. 1723, 1733, 64 L.Ed.2d 354 (1980)) (emphasis supplied). Thus, the material available for interpreting ERISA's definition of "accrual" always refers to the terms of the pension plan itself. It is those terms that raise the "anticipat[ion of] retirement benefits" that Congress sought to protect and the "promised . . . defined pension benefit" that the Supreme Court has sought to protect.

The IAM Plan provided a generous pension to its retired employees. That entire pension benefit—including the living pension feature—was promised, anticipated and accrued. The IAM decreased that accrued benefit by its 1976 amendment. That action occurred after ERISA's vesting requirements already bound labor unions such as the IAM. The IAM's amendment decreasing Shaw's accrued benefit therefore violates 29 U.S.C. § 1054(g).

The judgment of the district court is affirmed.

Excerpt from H.R. Rep. No. 93-807, 93d Cong., 2d Sess. (1974), reprinted in II ERISA Legislative History at 3180-81.

* * * *

Accrued benefits.—Under the committee bill, the vested employee is protected in his rights to all, or a certain percentage, of his "accrued benefit." It is necessary to provide a statutory definition of an "accrued benefit" because, unless this is a defined amount, vesting of an "accrued benefit" in whatever form is specified by the plan has little, if any, meaning. In the case of any retirement plan other than a defined benefit pension plan, under the bill the employee's "accrued benefit" is the balance in his plan account.[9] This would include, for example, a money purchase pension plan, a profit-sharing plan and a stock-bonus plan.

In the case of a defined benefit plan the bill provides that the accrued benefit is to be determined under the plan, subject to certain requirements. The term "accrued benefit" refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits, such as medical insurance or life insurance, which are sometimes provided for employees in conjunction with a pension plan, and are sometimes provided separately. To require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income. Also, where the employee moves from one employer to another, the ancillary benefits (which are usually on a contingency basis) would often be provided by the new employer, whereas the new employer normally would not provide pension benefits based on service with the old

---

* * * *

[9] Separate accounting for each employee is required under the committee bill in the case of contributions to a defined contribution plan and for voluntary employee contributions to a defined benefit plan.

employer. Also, the accrued benefit to which the vesting rules apply is not to include such items as the value of the right to receive benefits commencing at an age before normal retirement age, or so-called social security supplements which are commonly paid in the case of early retirement but then cease when the retiree attains the age at which he becomes entitled to receive current social security benefits, or any value in a plan's joint and survivor annuity provisions to the extent that exceeds the value of what the participant would be entitled to receive under a single life annuity.

Generally, an individual's "accrued benefit" under a defined benefit plan is to be expressed in the form of an annual benefit commencing at normal retirement age. Normal retirement age is the age specified in the plan, which may not be later than age 65 (or, if later, the 10th anniversary of the time the participant commenced participation in the plan).

Office - Supreme Court, U.S.
FILED
APR 22 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1629

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN; and EUGENE GLOVER, WILLIAM WINPISINGER and GEORGE POULIN as fiduciaries and trustees of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN,

Petitioners,

v.

EDWARD SHAW, Individually and On Behalf of All Other Persons Similarly Situated,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD P. DONALDSON, ESQ.
(Counsel of Record)
DONALDSON & ASSOCIATES
2819 First Ave.
Seattle, WA 98121
(206) 682-5261

ALFRED M. KLEIN, ESQ.
ROSE, KLEIN & MARIAS
888 W. 6th St., 2nd Floor
Los Angeles, CA 90017
(213) 626-0571

LENA S. ZEZULIN, ESQ.
THOMAS J. HART, ESQ.
THOMAS HART & ASSOCIATES
1625 Massachusetts Ave., N.W.,
Suite 302
Washington, D.C. 20036
(202) 797-8700

April 11, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

13pp

UNITED STATES DISTRICT COURT
C.D. CALIFORNIA

No. CV 81-6076-AAH

EDWARD SHAW,

Plaintiff,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN; JOSEPH MANNERS, EUGENE GLOVER, JUSTIN OSTRO, WILLIAM WINPISINGER and GEORGE POULIN as fiduciaries and trustees of the INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS PENSION PLAN,

Defendants.

May 9, 1983

Ronald Dean, Los Angeles, Cal., for plaintiff.

Rose, Klein & Marias by Alfred M. Klein, Los Angeles, Cal., and Donaldson & Kiel by Richard P. Donaldson, Seattle, Wash., for defendants.

DECISION GRANTING SUMMARY JUDGMENT FOR PLAINTIFF AND DENYING SUMMARY JUDGMENT FOR DEFENDANT.

HAUK, Senior District Judge.

These cross motions for summary judgment came on regularly for hearing on April 4, 1983. Plaintiff, by his motion, is seeking to reverse action taken by the defendants in "phasing out" the cost-of-living feature in his pension plan. Defendants seek affirmance of their hav-

ing amended this cost-of-living feature out of the plan. Stipulated facts form the basis of these motions and both parties concede that the case may be disposed of as a matter of law.

FACTUAL BACKGROUND

Plaintiff, Edward Shaw, retired as a District Lodge Business Representative of the International Association of Machinists and Aerospace Workers (hereafter IAM) on January 1, 1975, following 10 years of service. At the time of plaintiff's retirement his pension plan included a cost-of-living feature referred to as a "living pension." Under the living pension feature, increases in the retiree's pension were indexed to salary increases in the position the retiree held immediately prior to retirement.

In September, 1976, the delegates to the quadrennial IAM convention voted to amend the pension plan provisions of the constitution so as to phase out the living pension feature. This phase-out provided that the full percentage adjustment would be paid to retirees in 1977 and 1978, but thereafter, the living pensions adjustments would be as follows:

1979 and 1980—75% of full adjustments

1981 and 1982—50% of full adjustments

1983 and 1984—25% of full adjustments

After December 31, 1984—no further adjustments. The decision to phase the living pension feature out of the plan came after the IAM's actuaries had advised it that, if the pre-phase-out course should continue, the plan would suffer serious financial instability.

Plaintiff bases his motion for summary judgment on the following three theories: (1) that the phasing-out of the living pension feature of the plan violated the proscription in the Employee Retirement Income Security Act, 29 U.S.C. 1001 *et seq.* (hereafter ERISA) against any amendment which would decrease the ac-

crued benefits of a participant under the plan; (2) that the phase-out constituted a breach of the fiduciary duty which the plan trustees and administrators owed the plaintiff; and (3) that the phase-out violated established principles of contract law.

On the other hand, the basis for defendants' motion is: (1) that the 1976 amendment did not amount to a diminution of an "accrued benefit" under ERISA and, (2) even if the amendment did somehow affect an accrued benefit, it was fully justified under ERISA. In addition, defendants resist plaintiff's contention that the latter's claim properly sounds in an action for breach of a fiduciary duty or breach of contract.

DISCUSSION

Given the interdependence of the motions before the Court, the various contentions raised by the parties will be considered concurrently.

I. PLAINTIFF'S ERISA CLAIMS

As previously indicated, the plaintiff alleges that the 1976 amendment violates ERISA, 29 U.S.C. § 1054(g), which provides:

> The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) of this title.

Defendants initially argue that their action does not run afoul of ERISA because the living pension feature of plaintiff's plan does not amount to an "accrued benefit" within the definition of that term in ERISA. As provided in 29 U.S.C. § 1002(23):

> The term "accrued benefit" means
>
> (A) In the case of a defined benefit plan, the individual's accrued benefit determined under the plan

> and . . . expressed in the form of an annual benefit commencing at normal retirement age.

Defendants argue that this language embraces only benefits promised upon retirement and does not include post-retirement benefits such as the living pension feature. Plaintiff, on the other hand, contends that an accrued benefit may be expressed in the form of a *formula.* While relevant authority on this issue is sparse, plaintiff's argument appears to be the more meritorious. For example, section 411(a)(7)(A)(i) of the Internal Revenue Code defines the term "accrued benefit" in precisely the same words as section 1002(23) of ERISA. The Internal Revenue Service through a Technical Information Release has stated:

> IRC section 411(a)(7)(A)(i) provides, in part, that in the case of a defined benefit plan, the "accrued benefit" must be expressed in the form of an annual benefit commencing at normal retirement age. *The plan must provide a formula under which each participant's actual accrued benefit under the plan can be determined in each plan year.*

Internal Revenue Service T.I.R. No. 1403 (Sept. 17, 1975) (emphasis added). In addition, there is case law suggesting that an accrued benefit may be expressed by a formula as opposed to a sum certain that the pensioner will receive upon retirement. *Janowski v. International Brotherhood of Teamsters,* 500 F.Supp. 21, 23 (N.D.Ill. 1980). In *Pompano v. Michael Schiavone & Sons, Inc.,* 680 F.2d 911, at 914 (2d Cir. 1982), the Second Circuit held:

> . . . the plan must specify the basis on which payments are to be made to participants and beneficiaries so as to meet the legislative purpose of having each participant know exactly where he stands with respect to the plan.

The IAM's own pension plan booklet states:

> ADJUSTMENT OF PENSION AMOUNT AFTER RETIREMENT
>
> If, after your retirement, the salary for the position you held immediately prior to your retirement is changed, the amount of your pension will be adjusted accordingly. The change in pension amounts, however, will not be retroactive.

IAM Pension Plan (Wash.D.C. 1969), p. 10.

In addition, Article XIV, section 7 of the Constitution of the International Association of Machinists and Aerospace Workers provides in pertinent part:

> *Computation of Pension*
>
> Pensions being paid to previously retired officers and employees shall be adjusted by applying the appropriate foregoing percentage to the straight-time compensation for the classifications or positions corresponding to those in which they were employed immeditaely prior to their retirement, provided, however, that in no case shall any such adjustment be made on a retroactive basis, nor increase any benefit to a survivor or beneficiary then being paid. Effective January 1, 1973, neither shall any such adjustment result in a pension payment which is less than the amount paid to the retiree at the time of retirement.

IAM Constitution (Wash. D.C. 1974), p. 39.

Applying the above language against the various authorities which permit accrued benefits to be expressed through a formula, the conclusion is inescapable that the living pension feature was an integral part of the formula through which the plaintiff's accrued benefits were expressed. Defendants' attempts to distinguish the living pension from other components of the retirement compensation formula are, accordingly, void of merit.

Having determined that the living pension feature constitutes an accrued benefit, the next matter which must be addressed is whether the act of defendants in decreasing the accrued benefit of plaintiff was justified under ERISA.

As previously pointed out, 29 U.S.C. § 1054(g) forbids any amendment which would decrease the accrued benefit of a plan participant with the exception of an amendment effected pursuant to 29 U.S.C. § 1082(c)(8)(C) which provides:

> (8) For purposes of this part, any amendment applying to a plan year which—(C) does not reduce the accrued benefit of any participant determined as of the time of adoption except to the extent required by the circumstances, shall, at the election of the plan administrator, be deemed to have been made on the first day of such plan year. *No amendment described in this paragraph which reduces the accrued benefits of any participant shall take effect unless the plan administrator files a notice with the Secretary notifying him of such amendment and the Secretary has approved such amendment or, within 90 days after the date on which such notice was filed, failed to disapprove such amendment. No amendment described by the Secretary unless he determines that such amendment is necessary because of a substantial business hardship (as determined under section 1083(b) of this title) and that waiver under section 1083 (a) of this title is unavailable or inadequate.* (emphasis added).

Moreover, Section 1082(c)(8)(C) is found in Part 3 of ERISA which contains the funding provisions. The effective dates for Part 3 are located in section 1086 and subsection (e) of that section provides:

> In the case of a plan maintained by a labor organization which is exempt from tax under section 501

(c)(5) of Title 26 exclusively for the benefit of its employees and their beneficiaries, this part shall be applied by substituting for the term "December 31, 1975" in subsection (b) of this section, the earlier of—

(1) the date on which the second convention of such labor organization held after September 2, 1974 ends, or

(2) December 31, 1980,

but in no event shall a date earlier than the later of December 31, 1975, or the date determined under subsection (c) of this section be substituted.

The IAM is a tax exempt labor organization which maintains its pension plan exclusively for the benefit of its employees and their beneficiaries. It did not hold its second convention until September, 1980. Thus, contend the defendants, the procedure embodied in section 1082(c)(8)(C) was inapplicable to them since the amendment to the plan was effected four years prior to the effective date of this provision. Defendants further argue that the delayed applicability of the section 1082(c)(8)(C) procedure effectively creates a "grace period" for tax exempt labor organizations from the section 1054(g) prohibition against amendments decreasing the accrued benefits of a plan participant.

The defendants' arguments are unpersuasive for various reasons. First, section 1054(g) is found in Part 2 of ERISA, the provisions relating to participation and vesting. The effective dates for Part 2 are found in section 1061. Section 1061 provides no postponement of or exemption from applicability of the provisions located in Part 2 of ERISA for tax exempt labor organizations and no cross-reference is made to Part 3. It thus becomes apparent that Congress did not intend to create a "grace period" to insulate defendants from the applicability of section 1054(g) and that the September, 1976 amendment was properly subject to the proscription embodied therein.

The prohibition set forth in section 1054(g) is absolute, absent compliance with the section 1082(c)(8)(C) procedure. While the defendants argue that this procedure was unavailable to them at the time of the 1976 amendment because they had not yet held their second convention subsequent to September 2, 1974, there was nothing to prevent them from at least making application to the Secretary of Labor to demonstrate their good faith or even seek declaratory relief in the courts. In addition, had their effort to apply to the Secretary been resisted as premature, defendants had available a procedure for calling an emergency convention under Article II, section 1 of the IAM Constitution.[1]

In sum, while the section 1082(c)(8)(C) procedure was not applicable to the defendants at the time of the 1976 amendment because of the special effective dates for tax exempt labor organizations, the effective date of the Part 3 funding provisions cannot be applied to the Part 2 participation and vesting provisions where section 1054(g) is located. It is thus apparent that the actions of defendants in attempting to phase-out the living pension feature in the pension plan were not justified under ERISA and constitute diminution of plaintiff's accrued benefits under the plan.

---

[1] Article II, section 1 of the 1974 Constitution of the International Association of Machinists and Aerospace Workers provides in pertinent part:

* * * *

> The [Executive Council] will have the authority upon its own initiative to call a special convention in case of an emergency, or after having received the endorsement under seal of at least 20% of all [Local Lodge's], not more than 15 of which are located in any one state, province, or territory, submit a call for a special convention, and thereupon the [General Secretary-Treasurer] shall prepare a ballot and submit the same through the referendum calling for a special convention of the [Grand Lodge] to convene at such date as seems best to meet the emergency.

II. PLAINTIFF'S CLAIM OF BREACH OF FIDUCIARY DUTY

The IAM pension plan is administered by five of the defendants named in this action in their capacity as "fiduciaries and trustees" of the plan. While defendants suggest that the administrators of the plan are not true fiduciaries, the Court finds this argument untenable. Officials of a company which sponsors a plan are themselves fiduciaries to the extent that they retain authority for selection and retention of plan fiduciaries because, to that extent, they have retained discretionary authority or discretionary control respecting management of the plan. *Freund v. Marshall & Ilsley Bank*, 485 F.Supp. 629, 640 (W.D. Wis. 1979). If such non-trustee officials are to be considered fiduciaries, then *a fortiori* union officials who are administrators and trustees of the plan are fiduciaries. Pension trustees are obligated to act for the sole and exclusive benefit of the trust beneficiaries. *Ponce v. Laborers Pension Trust*, 628 F.2d 537 (9th Cir. 1980). The judgment of the trustees, however, may be set aside by the court only if it is found to have been exercised in an arbitrary and capricious manner. *Hicks v. Pacific Maritime Ass'n.*, 567 F.2d 355 (9th Cir. 1978).

Plaintiff alleges that the defendants/trustees had economic alternatives available other than the elimination of the living pension feature from the plan and thus failed to act for the sole and exclusive benefit of the trust beneficiaries. For example, plaintiff contends that the workforce presently employed by the IAM could have been denied salary increases for a period of time to guarantee financial stability of the fund. This point is effectively conceded by the affidavit of Eugene D. Glover, a plan trustee, which states in pertinent part:

> There is no doubt that the IAM could have saved present payroll costs, and pension contribution costs, by putting a lid on staff salary increases. But, in

> doing so, we would have also put a lid on loyalty, motivation and productivity.

Plaintiff argues that employees with vested pensions have thus been prejudiced by the defendants' generosity toward present employees.

While the amendment to the plan may, given the alternatives available, appear on its face to be arbitrary and capricious, there is a fatal defect in plaintiff's argument. Article IX, section 9.1 of the trust agreement under which the defendants/trustees receive their authority provides:

> The IAM reserves the right through action by its Grand Lodge or through action by a Grand Lodge Convention to alter, amend, or terminate Article XIV of its Constitution as in effect on January 1, 1973, as amended or this Trust Agreement at any time and in any manner for any reason *without the consent of the Trustees or any other person.* (emphasis added).

It is, of course, axiomatic that in order to abuse discretion, one must first possess the authority to exercise discretion. Absent such authority, it cannot be said that the defendants/trustees breached any fiduciary duty owed to plaintiff.

III. PLAINTIFF'S CONTRACT CLAIM

The pension plan here involved presents a classic textbook example of a unilateral offer that ripens into a contract only upon acceptance by performance. The IAM made a promise to its employees that, if they continued their employment with the Union in accordance with the terms of the plan, they would, upon reaching the required age and fulfilling other conditions for eligibility, receive a monthly pension according to the formula set forth in the plan.

The promise of the IAM constituted an offer, which could be accepted only by performance. *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 4-5 (1st Cir. 1978). Once plaintiff completed performance according to the terms of the offer, the Union's promise became binding. *Stacey v. Combs*, 671 F.2d 602, 606 (D.C. Cir. 1982). Under these principles, the vested retirement rights of plaintiff may not be altered without his consent. *Allied Chemical & Alkali Workers v. P.P.G. Co.*, 404 U.S. 157, 181 n. 20, 92 S.Ct. 383, 398-99 n. 20, 30 L.Ed.2d 341 (1971).

While the theoretical basis of plaintiff's argument is well supported, his contentions are irreparably handicapped by two factors. First, though the Union may have breached its agreement with plaintiff by amending its pension plan, the Union was not made a party to this action. At a minimum, it would appear that the Union would be a necessary party pursuant to Rule 19(a) of the Federal Rules of Civil Procedure and should have been joined as a defendant.

In addition, ERISA, being a comprehensive statute dealing with many aspects of employee benefits, includes a strong federal preemption provision. 29 U.S.C. § 1144 (a) provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003 (a) of this title and not exempt under section 1003 (b) of this title. This section shall take effect on January 1, 1975.

The Ninth Circuit has ruled that common law causes of action for breach of contract are preempted under this section. *Lafferty v. Solar Turbines International*, 666 F.2d 408 (9th Cir. 1982). As a result of these considerations, plaintiff's breach of contract theory must fail.

DECISION

Defendants' theory that the living pension feature of plaintiff's pension plan is not an "accrued benefit" and that an amendment to the plan decreasing the same was justified under ERISA is without merit and defendants motion for summary judgment is accordingly denied. Conversely, plaintiff's motion for summary judgment is granted based upon the clear violation of ERISA by the defendants.

With respect to plaintiff's allegations that plan administrators breached the fiduciary duty owed to plaintiff, the trust agreement under which the trustees are given authority permits the plan to be amended without their consent. Defendants/trustees were thus powerless to object to the action taken at the IAM Convention to amend the pension plan and this issue must be resolved in their favor.

Finally, plaintiff's contention of breach of contract must fail because he has failed to join the Union as a necessary party, and, in any event, is precluded from maintaining any action under this theory because it has been preempted by ERISA.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Office-Supreme Court, U.S.
FILED
MAY 10 1985
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-1629

In The
Supreme Court of the United States
October Term, 1984

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN; and EUGENE GLOVER, WILLIAM WINPISINGER and GEORGE POULIN as fiduciaries and trustees of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN,

Petitioners,

vs.

EDWARD SHAW, Individually and On Behalf of All Other Persons Similarly Situated,

Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RONALD DEAN, Esq.
(Counsel of Record)
15135 Sunset Blvd., Suite 280
Pacific Palisades, CA 90272
(213) 459-1636

ELIZABETH B. SPECTOR, Esq.
2142 Princeton Ave.
Los Angeles, CA 90026
(213) 660-3621

May 9, 1985

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964 OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

1985

TABLE OF CONTENTS

Page

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT:

1. The Question Presented Does Not Meet The Guidelines Of Supreme Court Rule 17. 2

   A. Section 301 Of The Retirement Equity Act Of 1984 (29 U.S.C. § 1054(g) (2)) Has Modified And Clarified The Statute And Removed Any Public Importance Of The Question Here Presented 3

   B. The Question Here Presented Is Of Isolated Significance; It Has No National Importance. 4

   C. The Burden Upon Petitioners Resulting From The Decision Does Not Warrant The Granting Of Certiorari. 5

2. The District Court And The Court of Appeals Were Correct In Holding That The Living Pension Feature Is An Accrued Benefit. 6

CONCLUSION 10

APPENDIX ..... App. 1

TABLE OF AUTHORITIES CITED

CASES:

Allied Chemical & Alkali Workers v. P.P.G. Co., 404 U.S. 157; 30 L.ed.2d 341; 92 S.Ct. 383 (1971) 7, 9

Betts v. Board of Administration, 21 C.3d 859, 148 Cal.Rptr. 158, 582 P.2d 614 (1978) 5

District of Columbia v. Sweeney, 310 U.S. 631, 84 L.ed. 1402 4

TABLE OF AUTHORITIES (Continued)

Page

Hoover v. Cumberland, Md. Area Teamsters Pension Fund, 756 F.2d 977 (3rd Cir 1985) (slip op. p. 16) 6, 9

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 99 L.ed. 897, 75 S.Ct. 614 (1955) 4, 5, 6

Rogers v. Missouri P.R. Co., 352 U.S. 493, 1 L.ed. 2d 493, 77 S.Ct. 443 (1957) 6

U.M.W. v. Robinson, 455 U.S. 562; 71 L.ed.2d 419; 102 S.Ct. 1226 (1982) 7

STATUTES:

26 U.S.C. 6110(j)(3) 8

ERISA §2(c), 29 U.S.C. 1001(c) 7

Retirement Equity Act of 1984, § 204(g) 3

Retirement Equity Act of 1984, §301, (Public Law 98-397), 29 U.S.C. 1054(g) (2) 2, 3, 8

TEXTS:

Frankfurter & Fisher, 51 Harv.L.Rev. 577 (1938) 5

43 Harv.L.Rev. 33, 52 (1929) 6

RULES:

Rule 17, Rules of the U.S. Supreme Court 2, 10

I.R.S. Letter Ruling 80224147 (March, 1980), C.C.H. Pension Plan Guide, ¶17,371X 8, 9

No. 84-1629

In The

Supreme Court of the United States

October Term, 1984

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN; and EUGENE GLOVER, WILLIAM WINPISINGER and GEORGE POULIN as fiduciaries and trustees of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN,

Petitioners,

vs.

EDWARD SHAW, Individually and On Behalf of All Other Persons Similarly Situated,

Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent, EDWARD SHAW, respectfully prays that this Court deny the petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 11, 1985.

Respondent adopts the statement in the petition with respect to the "Opinion Below" and "Jurisdiction."

STATUTORY PROVISIONS INVOLVED

To the statutory provisions set forth in the petition, respondent adds § 301 of the Retirement Equity Act of 1984, (Public Law 98-397), 29 U.S.C. 1054(g)(2), which substantially modified the statute at issue here:

> (2) For purposes of paragraph (1), a plan amendment which has the effect of—
>
> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> (B) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. . . .

———o———

STATEMENT OF THE CASE

For purposes of this opposition to the petition for certiorari, respondent adopts petitioners' Statement of the Case, reserving the right (should the writ of certiorari be granted) to set forth his independent Statement of the Case in his brief on the merits.

———o———

REASONS FOR DENYING THE WRIT

1. The Question Presented Does Not Meet The Guidelines Of Supreme Court Rule 17.

Supreme Court Rule 17 provides very limited standards with respect to review on writ of certiorari. While

these standards are not "controlling," it remains that Petitioners do not meet any of them.

Petitioners do not contend that there exists any conflict between the decision of the Ninth Circuit and other federal courts of appeals (or this Court) on the issue presented. Petitioners do not contend that there has been a departure "from the accepted and usual course of judicial proceedings, [so] as to call for an exercise of this Court's power of supervision." The only ground on which petitioners seek review by certiorari is that the Ninth Circuit has "decided an important question of federal law which has not been, but should be, settled by this Court."

A. Section 301 Of The Retirement Equity Act Of 1984 (29 U.S.C. § 1054(g) (2)) Has Modified And Clarified The Statute And Removed Any Public Importance Of The Question Here Presented.

The Retirement Equity Act of 1984 (hereinafter REA), *inter alia,* amended § 204(g) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1054(g), by adding subparagraph (2). Thus, future court decisions interpreting 204(g) will not be interpreting the same statute at issue here. Were this Court to grant the Petition and render its interpretation of this section as it existed before the amendment, the decision may be helpful but not necessarily controlling.

In light of the enactment of REA, and the standards governing the exercise of the Court's discretionary power of review upon writ of certiorari, and with due regard to the proper functioning of the limited reviewing power

to which this Court is confined, this case cannot be deemed to be one in which "there are special and important reasons" for granting the writ. *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 99 L.ed. 897, 901, 75 S.Ct. 614 (1955). See also *District of Columbia v. Sweeney,* 310 U.S. 631, 84 L.ed. 1402 (where a tax is laid under a statute which has been repealed, the question is not of public importance, and certiorari will be denied).

B. The Question Here Presented Is Of Isolated Significance; It Has No National Importance.

Petitioners contend that "the Ninth Circuit's decision will adversely affect a matter of significant public importance—the continued availability of ancillary benefits to millions of private pension plan participants." (Petition, p. 7.) Petitioners' brush is broad but not convincing. As petitioners themselves pointed out in their Opening Brief submitted to the Court of Appeals (page 13, footnote 6):

> Mr. Shepard A. Sheinkman, the Martin E. Segal Company executive assigned to the IAM Pension Plan account, indicated that the living pension feature was *unusual* in that most other pension plans pay fixed retirement benefits at the time of retirement and do not provide for post-retirement adjustments. (R.E. 18, p. 6) (Emphasis added)

In the entire history of this litigation, neither the parties nor the courts which have rendered opinions have been able to find a decision, published or not, dealing with anything similar to a "living pension." There is no "density of litigation" dependent upon a Supreme Court

decision in this matter, a factor cited by Justice Frankfurter as one of the chief determinants of whether the "intrinsic importance" of an issue is sufficient to warrant certiorari. Frankfurter & Fisher, 51 Harv.L.Rev. 577, 598 (1938).

Post retirement increases were more common in the public pension arena, where it has been consistently held that amendments such as the one here would *not* be allowed. *Betts v. Board of Administration,* 21 C.3d 859, 148 Cal.Rptr. 158, 582 P.2d 614 (1978).

The Ninth Circuit decision in this case did not purport to deal with the larger question of the precise definition of "ancillary" benefits. Rather, the decision was specific and confined to the holding that this unusual "living pension" was more like a retirement benefit than an ancillary benefit. The Ninth Circuit clearly distinguished between ancillary benefits such as medical or life insurance which lack the "primary function . . . [of] provid[ing] retirement income" which are in no way affected by the decision, and a benefit such as the one at issue here which is clearly retirement income. (Decision, pp. 11a and 12a) As was the case in *Rice, supra,* the question presented is of "isolated significance," not warranting the grant of certiorari.

C. The Burden Upon Petitioners Resulting From The Decision Does Not Warrant The Granting Of Certiorari.

There is no doubt that the Ninth Circuit's decision will be a burden to Petitioners. However, the situation in which the Plan finds itself is largely of its own making. At the time the amendment was under consideration, the

Pension Plan had the right to seek the approval of the "Secretary" for such a reduction on the grounds of the very hardship they now assert. While Congress wanted the "Secretary" to make an objective determination of business hardship, petitioners contend that they alone are entitled to make that determination. Neither was there legal compulsion requiring the substantial wage increases petitioners gave to their active employees, which trigger the "living pension" provisions of the Plan.

Since the Plan trustees adopted an amendment eliminating this accrued benefit without first seeking approval of the "Secretary" by proving business hardship "they cannot now complain of their financial straits." *Hoover v. Cumberland, Md. Area Teamsters Pension Fund,* 756 F.2d 977 (3rd Cir 1985) (slip op. p. 16).

In any event, this Court does not sit for the benefit of the particular litigators. *Rice, supra,* 99 L.ed. at 901. Certiorari cannot serve as relief from an erroneous result or even from individual hardship. 43 Harv.L.Rev. 33, 52 (1929). Importance of the outcome merely to the parties is not enough; "This is not the supreme court of review for every case decided 'unfairly' by every court in the country." *Rogers v. Missouri P.R. Co.,* 352 U.S. 493, 500, 524, 1 L.ed.2d 493, 77 S. Ct. 443 (1957), Frankfurter, J., Dissent, 1 L.ed.2d at 530.

2. The District Court And The Court Of Appeals Were Correct In Holding That The Living Pension Feature Is An Accrued Benefit.

Before the passage of ERISA, it was clear that a retiree's benefit as described in the plan at the time of retirement could not be changed without the consent of

the retiree. *Allied Chemical & Alkali Workers v. P.P.G. Co.*, 404 U.S. 157, 161, n. 20; 30 L.ed. 2d 341; 92 S.Ct. 383 (1971); *U.M.W. v. Robinson*, 455 U.S. 562, n. 14; 71 L.ed.2d 419; 102 S.Ct. 1226 (1982).

ERISA was designed to even further protect the interests of participants and beneficiaries.

> It is hereby further declared to be the policy of this Act to protect . . . the interests of participants in private pension plans and their beneficiaries by *improving the equitable character* and the soundness of such plans . . . (ERISA §2(c), 29 U.S.C. 1001(c)) (emphasis added).

However, ERISA also gave petitioners something they did not have before—a method of reducing accrued benefits by showing "business hardship." They chose not to exercise that right and instead argue that this is merely an ancillary benefit, not a retirement benefit.

The legislative history of ERISA makes clear that Congress intended that the term "accrued benefit" refer to normal retirement age benefits. While a plan may also provide additional retirement-like benefits that begin before normal retirement age, these additional benefits were not (before REA) generally considered as "accrued benefits."

These "ancillary benefits"—such as payment of medical expenses, disability benefits, life insurance premiums and early retirement supplements—may also be provided by a subsequent employer. However, the key factor in distinguishing between the two is whether the primary function of the benefit in question is to provide retirement income at or after *normal* retirement age—a time

when presumably the participant will not have a subsequent employer.

Indeed, as Petitioner points out, Congress characterized a social security supplement as an ancillary benefit, but as noted in the legislative history cited in Petitioner's Appendix (page 18a), these are benefits payable *before* normal retirement age.

> Also, the accrued benefit to which the vesting rules apply is not to include . . . so-called social security supplements which are commonly paid in the case of *early* retirement *but then cease* when the retiree attains the age at which he becomes entitled to receive current social security benefits. . . . (emphasis added)

With the passage of REA, even this social security supplement to which Petitioners seek to analogize is now also considered an accrued benefit.

All of the cases cited by petitioners can be distinguished on the basis that they involved either (or both) benefits payable *before* normal retirement age or the amendment applied only to *future* retirees who had not yet reached normal retirement age.

The accrued benefit to which Shaw is entitled is expressed in terms of a "formula," which is perfectly proper (Opinion of the district court, petitioner's supplemental appendix, page SA-4). So it was in I.R.S. Letter Ruling 80224147 (March, 1980), C.C.H. Pension Plan Guide, ¶17,-371X, pages 20,885-87 (reprinted in the Appendix).[1] There the plan had a provision for payment of benefits in a lump sum at retirement and, as here, a post retirement

---

[1] This letter ruling is not cited as "precedent", 26 U.S.C. 6110(j) (3), but only as an indication of the position of the IRS.

cost of living feature. In order to qualify as a "lump sum distribution" the entire balance of the account (accrued benefit) must be paid in one tax year. The letter ruling held:

> Accordingly, the balance to the employee's credit *must include the cost-of-living adjustment* if the distribution is to be eligible for lump sum tax treatment under section 402(e) of the Code. (C.C.H. Guide at Appendix page 5) (emphasis added)

Although the I.R.S. approved Petitioners' plan as tax exempt, there is absolutely no evidence that the I.R.S. was specifically advised of this change nor that it was considered by them. The fact that they issue such approval to tens of thousands of plans each year inveighs against the argument that the I.R.S. was even aware of what had occurred. Nonetheless, it is solely within the jurisdiction of the "Secretary," not the I.R.S., to approve reductions in accrued benefits.

Petitioners' essential argument is that they are entitled to break a promise made to Shaw during his working years, a promise that presumably was at least a partial inducement for his continued employment. Now that he is unable to "quit" his job and work for another employer, they seek to unilaterally renegotiate the promise. As stated in *Hoover, supra,* at slip opinion page 19:

> A plan amendment that retroactively reduces benefits promised to plaintiffs for almost seven years is precisely the sort of inequity Congress designed ERISA to prevent.

The unfairness to Shaw is apparent. At the time he retired, the living pension feature could not be taken from him. *Allied Chemical, supra.* Thereafter, ERISA, a law

designed to further protect his rights, became applicable to this Plan. The Plan is now asserting its alleged right to take away from Shaw that which he spent his productive years earning. They want to take it away so they can provide even larger wage increases to the currently active employees. Surely ERISA did not contemplate such a result.

———o———

CONCLUSION

For all the reasons stated above, this Court, in the exercise of its discretion pursuant to Rule 17, should deny the Petition for Writ of Certiorari.

Respectfully submitted,

RONALD DEAN, Esq.
(Counsel of Record)
15135 Sunset Blvd., Suite 280
Pacific Palisades, CA 90272
(213) 459-1636

ELIZABETH B. SPECTOR, Esq.
2142 Princeton Ave.
Los Angeles, CA 90026
(213) 660-3621

May 9, 1985

APPENDIX

Letter Ruling 8024147, March, 1980.

Taxability of Beneficiary

This is in response to a letter dated January 23, 1980, in which your authorized representative requested a ruling on your behalf concerning certain federal income tax consequences to Plan X participants as a result of proposed amendments to the plan.

M Corporation maintains Plan X, a defined benefit pension plan, which was determined by the appropriate District Director to be qualified under section 401(a) and tax-exempt under section 501(a) of the Internal Revenue Code.

Under Plan X, absent a timely election of another option, the retirement benefit of an unmarried employee is paid in the form of straight life annunity and the retirement benefit of a married employee is paid in the form of a joint and 50% survivor annunity with the employee's spouse as beneficiary. Optional payout methods are available if a timely election is filed. These options include (1) a joint and survivor annunity in any form which satisfies the incidental death benefits requirement, (2) a life annunity with payment of 12 months certain, and (3) in the case of employees eligible for each or normal retirement benefits who retire from active employment after age 60, a lump sum equal to the actuarial equivalent of the employee's straight life annunity.

It is proposed that the amount payable under the lump sum option would be calculated in accordance with a table to be published in the Plan X document and that the tables

will be produced utilizing unisex rates based upon the 1971 Group Annunity Mortality Table at a two-to-one male/female ratio (current ratio of active plan participants and a discount rate that will fluctuate according to the Moody's Average of Yield on Aaa Corporate Bonds (Moody Aaa rate). The following is an abbreviated example of the factors that would be produced using such a table:

TABLE 1

Lump Sum Value of $1/Year Life Annunity
With No Adjustment for Post-Retirement Increases

Age at Retirement	Interest Rate 6	7	8½	10	12
60	11.05	10.23	9.15	8.28	7.33
62	10.55	9.78	8.81	8.00	7.12
65	9.75	9.09	8.25	7.54	6.76
70	8.35	7.86	7.23	6.68	6.07

M Corporation also has under consideration a proposal whereby Plan X would be amended to include a provision for a post-retirement cost-of-living adjustment for all participants and beneficiaries which would commence at age 66 for participants retiring at age 65 or earlier, or after the first year of retirement for participants retiring after age 65. Under the proposed cost-of-living adjustment, periodic benefits payable under Plan X after retirement age would be automatically increased or decreased each year by 50% of the increase or decrease in the Consumer Price Index for All Urban Consumers (CPI-U, U. S. City Average, all items, 1967, equalling one hundred (100), from the U. S. Department of Labor Bureau of Labor Statistics, Washington, D. C.) (hereinafter "CPI") with a maximum

limit of 4% per year increase in benefits (which would occur with an increase of 8% or more in the CPI). There would, however, be no adjustment in benefits if the CPI increased less than 2% in any year. In no event would a retired participant's benefit be adjusted to an amount less than he was receiving at retirement.

Under the proposal, participants who elect a lump sum payout of their benefit under Plan X may be paid any cost-of-living adjustment over time as a life annunity, as annual single sum increments, or as part of the lump sum distribution made at the time of retirement, depending on the discretion of the Plan X administrator.

If the cost-of-living adjustment is paid in one lump sum, the amount of the lump sum including such adjustment will be calculated in accordance with Table 2 that uses the same unisex rates and fluctuating discount rates as in Table 1, after reducing the applicable Moody Aaa rate by an assumed rate of real return, thus recognizing only the inflation factor in determining the lump sum adjustment.

TABLE 2

Lump Sum Value of $1/Year Life Annunity
Adjusted for Assumed Post-Retirement Increases

Age at Retirement	Interest Rate 6	7	8½	10	12
60	12.00	11.27	10.30	9.46	8.28
62	11.64	11.02	10.20	9.47	8.33
65	11.10	10.68	10.10	9.58	8.54
70	9.32	9.02	8.59	8.23	7.43

These long term Bonds rates which are financial indicators for the next twenty years reflect two components;

an expected rate of real return on investments and an expected rate of inflation. For purposes of these calculations, the component for the expected real rate of return is assumed to be two and one-half percent (2½%). The 2½% rate of real return was developed by M Corporation's economists based upon their analyses of bond rates and rates of inflation of the U. S. economy over the last twelve decades. Examples of how Table 2 would be prepared with expected rates of inflation and cost-of-living adjustments tied to various Moody Aaa rates appear below:

Moody Aaa Rate	Assumed Inflation Rate as Expressed by the Percentage Change in the CPI	Cost-of-Living Adjustment
6.0%	3.5%	1.75%
7.0%	4.5%	2.25%
8.0%	5.5%	2.75%
8.5%	6.0%	3.0%
9.0%	6.5%	3.25%
10.0%	7.5%	3.75%
11.0%	8.5%	4.0%
12.0%	9.5%	4.0%
13.3%	11.0%	4.0%

Based on the foregoing, your authorized representative requested a ruling on your behalf that an employee who elects to receive his retirement benefit under Plan X in a lump sum at the time of retirement computed in accordance with the proposed Plan X adjustments and whose lump sum at such time includes the cost-of-living adjustment based on the Tables under Plan X will be in receipt of his entire nonforfeitable accrued benefit under Plan X in compliance with section 411 of the Code and will be

entitled to treat the entire distribution as a lump sum distribution under section 402(e) (4) (A) of the Code.

Section 402(e) (4) (A) of the Code defines a lump sum distribution as the distribution or payment from a qualified employees' trust within one taxable year of the recipient of the balance to the credit of an employee which becomes payable to the recipient, for example, on account of the employee's separation from the service. Section 1.402(e)-2(d) (1) (ii) of the Proposed Income Tax Regulations provides that a distribution or payment is not a lump sum distribution unless it constitutes the balance to the credit of the employee at the time the distribution or payment commences, i.e., the date on which the employee separated from service.

Under the proposed amendment to Plan X, upon his separation from service, a participant has a calculable interest in the prospective cost-of-living increase in his retirement benefits which, therefore, constitutes part of the balance to the employee's credit. Accordingly, the balance to the employee's credit must include the cost-of-living adjustment if the distribution is to be eligible for lump sum tax treatment under section 402(e) of the Code.

Accordingly, we conclude that an employee who elects to receive his retirement benefit under Plan X in a lump sum at the time of retirement computed in accordance with the proposed Plan X adjustments and whose lump sum at such time includes the cost-of-living adjustment based on the Tables under Plan X will be in receipt of his entire nonforfeitable accrued benefit under Plan X in compliance with section 411 and will be entitled to treat

the entire distribution as a lump sum distribution under section 402(e) (4) (A).

This ruling is based on the following assumptions:

(a) that the requirements of Code sections 402(e) (4) (B), (C), and (H), to the extent applicable, are satisfied;

(b) that the benefit with respect to a Plan X participant will not exceed the limitations provided under section 415(b) of the Code;

(c) that Plan X will remain qualified and tax-exempt under sections 401(a) and 501(a) of the Code.